

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

INTERIM APPLICATION NO.916 OF 2023
IN
SECOND APPEAL NO.23 OF 2011

Surekha Balwant Mali

...Applicant.

Versus

Shankar Natha Mali

(Since deceased. Thru. His Legal Heirs)

Kisan Shankar Mali And Ors.

...Respondents.

Adv. Shrishail Sakhare for the Appellant in SA/23/2011 and for the Applicant in IA/916 /2023.

Adv. S. A. Rajeshirke for Respondent No. 2.

Coram : Sharmila U. Deshmukh, J.

Date : May 2, 2024.

P. C. :

1. Interim Application has been preferred seeking condonation of delay of 9 years and 7 months caused in filing the present Interim Application and for quashing and setting aside the order dated 22nd February, 2013 by which the Second Appeal No. 23 of 2011 was permitted to be withdrawn. For sake of convenience, the parties are referred to by their status before the Trial Court.

2. The facts of the case are that Regular Civil Suit No. 321 of 1992 came to be filed by the Plaintiff who is the husband of the present Applicant for partition and separate possession of the suit properties

mentioned in schedule A, B, C, and D of the Plaint. The Respondent No. 2 herein was the contesting Defendant No. 3 who is the brother of the Plaintiff and had filed written statement and counter claim seeking impleadment of two more properties i.e. one shop at Delhi and one plot in Sangli city for partition. During the pendency of the proceedings, a sale-deed was executed in respect of the suit properties at serial No. 1 to 3 in favour of the present Applicant by the Defendant No. 1 who was the father of the Plaintiff and thereafter, the present Applicant came to be impleaded as Defendant No. 8 in the proceedings.

3. By order dated 31st July, 2002, the Trial Court held that the suit properties were ancestral joint family properties and the sale-deeds executed in favour of Defendant No. 8 are not binding on the Defendant No. 3 and that there was no legal necessity for sale of the properties. The Trial Court directed that properties which were part of the sale-deed be kept to the share of the Plaintiff and Defendant No. 1. The counter claim of Defendant No. 3 seeking to include the other properties in partition came to be dismissed.

4. Regular Civil Appeal No. 206 of 2002 was preferred by Defendant No. 3 challenging the dismissal of the counter claim seeking inclusion of the properties at Sangli and Delhi for partition

and to challenge the decree to the extent of allotting the properties alienated by Defendant No. 1 to the share of the Plaintiff and Defendant No. 1. There was no challenge by the Plaintiff and the Defendant No. 8 to the findings of the properties being ancestral joint family properties and that the sale-deed executed in favour of Defendant No. 8 is not binding on Defendant No. 3 and as such, attained finality.

5. The Appellate Court by Judgment and order dated 9th September, 2010 allowed the Appeal by modifying the decree of the Trial Court by decreeing the counter claim and also directed inclusion of the properties alienated in favour of Defendant No. 8 to be partitioned.

6. As against this two Second Appeals came to be filed before this Court being Second Appeal No. 34 of 2011 which was filed by the Plaintiff and Second Appeal No. 23 of 2011 which was filed by the present Applicant. The Second Appeal No. 23 of 2011 was permitted to be withdrawn by order dated 22rd February, 2013 and the present Application has been filed for setting aside the order of this Court dated 23rd February 2013 permitting the withdrawal of the Second Appeal.

7. Head Mr. Sakhare, learned counsel for the Applicant and Mr.

Rajeshirke, learned counsel for the Respondents.

8. Learned counsel for the Applicant would submit that the Applicant had not given instructions to the Advocate for the Applicant to withdraw the Second Appeal No. 23 of 2011. He submits that the properties which were the subject matter of the sale deed by Defendant No. 1 in her favour were her self acquired properties and as such, she was aggrieved by the order of the Appellate Court by inclusion of the said properties for partition and separate possession. He further submits that for the first time in July, 2022, when the final decree proceedings were initiated, the Applicant became aware of the withdrawal of Second Appeal No. 23 of 2011. He submitted that the Applicant was not informed by her Advocate about withdrawal of the Second Appeal.

9. He would further submit that despite contacting the Advocate on record, no intimation was received from the Advocate. He submits that in interest of justice, the said Application may be allowed.

10. *Per contra*, learned counsel for Respondent No. 1 would submit that there was no challenge to the findings of the Trial Court as regards the suit properties being ancestral joint family properties and that the sale-deed executed in favour of the Defendant No. 8 is not binding on the share of the Defendant No. 3. The judgment of Trial

Court was challenged only by Defendant No. 3 and thus the findings *qua* the nature of suit properties attained finality.

11. He would further submit that both the Appeals were filed through common Advocate and both the Appeals were being heard together. He submits that Second Appeal No. 34 of 2011 was admitted by order of this Court on 3rd July, 2012 on substantial question of law regarding the ancestral nature of the properties at Delhi and Sangli. He submits that after admission of the connected Second Appeal No. 34 of 2011, the Second Appeal No. 23 of 2011, was withdrawn on the ground that the connected Second Appeal is already admitted. He submits that by change of Advocates, the earlier withdrawal is now sought to be resiled from which is impermissible. He would further submit that the Plaintiff and the Defendant No. 8 are residing together and that the fact of withdrawal was therefore to the knowledge of the Defendant No. 8.

12. Considered the submissions and perused the record.

13. The facts are not disputed that there is finding of the Trial Court that the suit properties were ancestral joint family properties and the sale deed executed in favour of Defendant No. 8 is not binding on the share of Defendant No. 3 as there was no legal necessity for alienation by Defendant No. 1. In absence of any challenge by

Defendant No. 8, the findings had attained finality. Defendant No. 3 had challenged the dismissal of the counter claim which was filed seeking inclusion of properties at Delhi and Sangli in partition. The Appellate Court had allowed the counter claim by modifying the decree for partition by including these two properties. The extent of challenge before this Court in Second Appeal was thus limited to the extent of inclusion of the properties of Delhi and Sangli. The Plaintiff's Appeal was therefore admitted on the issue of these two properties.

14. By way of the two Second Appeals, Defendant No.8 as well as the Plaintiff had challenged the order of the Appellate Court and both the Appeals were filed through common Advocate. By order dated 3rd July, 2012, the Appeal of the Plaintiff was admitted as regards the nature of the properties which were sought be impleaded by way of the counter claim and in view thereof, the connected Appeal of Defendant No. 8 came to be withdrawn and rightly so as the Trial Court findings had already attained finality as regards the properties being the ancestral joint family properties and not binding on the share of Defendant No. 3.

15. As held by the Apex Court in the case of ***Jagtar Singh vs. Pargat Singh and Ors., [(1996) 11 SCC]*** Order III Rule 4 of CPC

empowers the counsel to continue on record until the proceedings in the suit are duly terminated and the counsel therefore has the power to make a statement on instructions of the parties to withdraw the Appeal.

16. The Supreme Court in the case of *Jamilabai Abdul Kadar vs Shankerlal Gulabchand and Others*, [1975 AIR 2202], at page 1 held thus:

“A legal practitioner, whether an Advocate or Pleader, therefore, has actual though implied authority to compromise a case even without specific consent from his client subject to the two overriding considerations (i) he must act in good faith, and for the benefit of his client otherwise the power fails and (ii) it is prudent and proper to consult his client and take his consent if there is time and opportunity. In any case, if there is any instruction to the contrary or withdrawal of authority the implicit power to compromise will fall to the ground.”

17. It is thus clear that the Advocate on record had an implied authority to compromise the case provided that he acted in good faith. Examining the facts of the present case, it is clear that in absence of any challenge by Defendant No. 8 before the 1st Appellate Court, the challenge in the Second Appeal was limited to the issue

raised in the counter claim with which the Defendant No. 8 had no concern. Although, the contention is that no instructions were given for withdrawal, what is relevant is that despite the so called, non response by the Advocate on record, no communication was addressed to the Advocate seeking explanation in this regard. Pertinently, the same Advocate is continued in the connected Second Appeal by the Defendant No. 8's husband.

18. In event of occurrence of any development affecting the rights of the litigant *de-hors* instructions in that regard, the logical step to be taken is atleast to address a communication to the concerned Advocate immediately seeking explanation putting the facts on record. It is also pertinent to note that the submission of learned counsel for the Respondent that the Plaintiff and Defendant No. 8 are residing together being husband and wife is not disputed by learned Counsel for Applicant and therefore, it cannot be said that the Defendant No. 8 was unaware of the withdrawal of the Second Appeal. In the Application there are no details set forth about her efforts to contact her Advocate. Only bald assertion is made that she tried to contact her Advocate, but there was no response. This averment when viewed in the light of the fact that her husband has continued with the same Advocate in his Second Appeal raises doubt

about the truthfulness of the averment.

19. In my view, even if it is accepted that there were no instructions for withdrawal, considering the facts of the case, the Counsel on basis of his implied authority has withdrawn the Appeal in view of the admission of connected Second Appeal. There is no reason as to why he would withdraw the Second Appeal No. 23 of 2011 only. It is clear that after admission of the connected Appeal on 3rd July, 2012 on the relevant substantial question of law, the decision was taken to withdraw the Second Appeal No. 23 of 2011 as regards the finding which had attained finality in the Trial Court itself. It is not demonstrated that the act of withdrawal is not in best interest of the Applicant.

20. As rightly pointed out, the change of Advocates has resulted in filing of the present Application after gap of about nine years for which there is no sufficient cause except stating that she was unaware of the withdrawal. The explanation cannot be digested for the reason that the Appellant in connected Second Appeal is her husband and therefore, it is doubtful that she would not be aware of the withdrawal. It is also not her case that even her husband was not aware of the withdrawal. It appears that attempts are now being made to stall the execution proceedings to avoid partitioning of the

properties forming subject matter of sale deed after having failed to challenge the findings of the Trial Court which conduct cannot be countenanced.

21. In my view, in facts of present case, permitting the Application would undermine the authority given to the Advocate to act in best interest of the litigant. A change in the Advocate cannot result into resiling from the earlier position.

22. In light of the above, the interim Application being devoid of merits stands dismissed.

[Sharmila U. Deshmukh, J.]